

AMENDED IN ASSEMBLY MAY 24, 2004

AMENDED IN ASSEMBLY MAY 5, 2004

AMENDED IN ASSEMBLY APRIL 27, 2004

AMENDED IN ASSEMBLY APRIL 16, 2004

AMENDED IN ASSEMBLY APRIL 1, 2004

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2611**

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**Introduced by Assembly Member Simitian**

February 20, 2004

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An act to amend Section 368 of the Penal Code, and to amend ~~Sections 15630 and~~ *Section* 15657 of, and to add Section ~~15630.2~~ 15657.5 to, the Welfare and Institutions Code, relating to elder and dependent adult abuse.

LEGISLATIVE COUNSEL'S DIGEST

AB 2611, as amended, Simitian. Elder and dependent adult abuse.

(1) Existing law proscribes crimes against elder and dependent adults involving physical and financial abuse.

Existing law establishes criminal penalties for the willful abuse of an elder or dependent adult, when the person who permits or inflicts the abuse has knowledge that the victim is an elder or dependent adult.

This bill would revise the above standard to impose the existing penalties regardless of whether the person has knowledge that the victim may be an elder or dependent adult. By changing the definition

of an existing crime this bill would impose a state-mandated local program.

~~(2) The Elder Abuse and Dependent Adult Civil Protection Act requires persons characterized as mandated reporters to report physical abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult, and provides that any mandated reporter who does not make the report is guilty of a misdemeanor.~~

~~This bill would include financial institutions subject to regulation by the Commissioner of Financial Institutions or certain federal regulators as mandated reporters under the act in cases of elder financial abuse, thereby requiring these entities to report those cases to the adult protective services agency or the local law enforcement agency. The bill would impose a state-mandated local program by applying the criminal penalty to a financial institution for these purposes.~~

~~(3) Existing law includes provisions relating to the award of attorney's fees and costs, and damages to a plaintiff, when it is proven by clear and convincing evidence that a defendant is liable for physical abuse, neglect, or financial abuse, and the defendant has also been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse.~~

~~This bill would revise these provisions to change the standard of proof for the commission of financial abuse and the proof of without recklessness, oppression, fraud, or malice for financial abuse to a preponderance of the evidence. The bill would also extend the above provisions to a defendant who has demonstrated or exhibited, recklessness, oppression, fraud, or malice in the commission of the described elder or dependent adult abuse.~~

~~(4)~~

~~(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

~~Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.~~

*The people of the State of California do enact as follows:*

SECTION 1. Section 368 of the Penal Code is amended to read:

368. (a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

(b) (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.

(2) If in the commission of an offense described in paragraph (1), the victim suffers great bodily injury, as defined in Section 12022.7, the defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.

(B) Five years if the victim is 70 years of age or older.

(3) If in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim, the defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.

(B) Seven years if the victim is 70 years of age or older.

(c) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having

1 the care or custody of any elder or dependent adult, willfully  
2 causes or permits the person or health of the elder or dependent  
3 adult to be injured or willfully causes or permits the elder or  
4 dependent adult to be placed in a situation in which his or her  
5 person or health may be endangered, is guilty of a misdemeanor.  
6 A second or subsequent violation of this subdivision is punishable  
7 by a fine not to exceed two thousand dollars (\$2,000), or by  
8 imprisonment in a county jail not to exceed one year, or by both  
9 that fine and imprisonment.

10 (d) Any person who is not a caretaker who violates any  
11 provision of law proscribing theft, embezzlement, forgery, or  
12 fraud, or who violates Section 530.5 proscribing identity theft,  
13 with respect to the property or personal identifying information of  
14 an elder or a dependent adult is subject to imprisonment in a county  
15 jail not exceeding one year, or in the state prison for two, three, or  
16 four years, when the money, labor, goods, services, or real or  
17 personal property taken or obtained is of a value exceeding four  
18 hundred dollars (\$400); and by a fine not exceeding one thousand  
19 dollars (\$1,000), by imprisonment in a county jail not exceeding  
20 one year, or by both that fine and imprisonment, when the money,  
21 labor, goods, services, or real or personal property taken or  
22 obtained is of a value not exceeding four hundred dollars (\$400).

23 (e) Any caretaker of an elder or a dependent adult who violates  
24 any provision of law proscribing theft, embezzlement, forgery, or  
25 fraud, or who violates Section 530.5 proscribing identity theft,  
26 with respect to the property or personal identifying information of  
27 that elder or dependent adult, is subject to imprisonment in a  
28 county jail not exceeding one year, or in the state prison for two,  
29 three, or four years when the money, labor, goods, services, or real  
30 or personal property taken or obtained is of a value exceeding four  
31 hundred dollars (\$400), and by a fine not exceeding one thousand  
32 dollars (\$1,000), by imprisonment in a county jail not exceeding  
33 one year, or by both that fine and imprisonment, when the money,  
34 labor, goods, services, or real or personal property taken or  
35 obtained is of a value not exceeding four hundred dollars (\$400).

36 (f) Any person who commits the false imprisonment of an elder  
37 or a dependent adult by the use of violence, menace, fraud, or  
38 deceit is subject to imprisonment in the state prison for two, three,  
39 or four years.

(g) As used in this section, “elder” means any person who is 65 years of age or older.

(h) As used in this section, “dependent adult” means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. “Dependent adult” includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(i) As used in this section, “caretaker” means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.

(j) Nothing in this section shall preclude prosecution under both this section and Section 187 or 12022.7 or any other provision of law. However, a person shall not receive an additional term of imprisonment under both paragraphs (2) and (3) of subdivision (b) for any single offense, nor shall a person receive an additional term of imprisonment under both Section 12022.7 and paragraph (2) or (3) of subdivision (b) for any single offense.

~~SEC. 2.—Section 15630 of the Welfare and Institutions Code is amended to read:~~

~~15630.—(a) Any person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency, is a mandated reporter.~~

~~(b) (1) Any mandated reporter who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, abandonment, abduction, isolation, financial abuse, or neglect, or is told by an elder or dependent adult that he or she has experienced behavior, including an act or omission, constituting physical abuse, abandonment, abduction, isolation,~~

~~financial abuse, or neglect, or reasonably suspects that abuse, shall report the known or suspected instance of abuse by telephone immediately or as soon as practicably possible, and by written report sent within two working days, as follows:~~

~~(A) If the abuse has occurred in a long-term care facility, except a state mental health hospital or a state developmental center, the report shall be made to the local ombudsman or the local law enforcement agency.~~

~~Except in an emergency, the local ombudsman and the local law enforcement agency shall, as soon as practicable, do all of the following:~~

~~(i) Report to the State Department of Health Services any case of known or suspected abuse occurring in a long-term health care facility, as defined in subdivision (a) of Section 1418 of the Health and Safety Code.~~

~~(ii) Report to the State Department of Social Services any case of known or suspected abuse occurring in a residential care facility for the elderly, as defined in Section 1569.2 of the Health and Safety Code, or in an adult day care facility, as defined in paragraph (2) of subdivision (a) of Section 1502.~~

~~(iii) Report to the State Department of Health Services and the California Department of Aging any case of known or suspected abuse occurring in an adult day health care center, as defined in subdivision (b) of Section 1570.7 of the Health and Safety Code.~~

~~(iv) Report to the Bureau of Medi-Cal Fraud and Elder Abuse any case of known or suspected criminal activity.~~

~~(B) If the suspected or alleged abuse occurred in a state mental hospital or a state developmental center, the report shall be made to designated investigators of the State Department of Mental Health or the State Department of Developmental Services, or to the local law enforcement agency.~~

~~Except in an emergency, the local law enforcement agency shall, as soon as practicable, report any case of known or suspected criminal activity to the Bureau of Medi-Cal Fraud and Elder Abuse.~~

~~(C) If the abuse has occurred any place other than one described in subparagraph (A), the report shall be made to the adult protective services agency or the local law enforcement agency.~~

~~(2) (A) A mandated reporter who is a clergy member who acquires knowledge or reasonable suspicion of elder or dependent~~

1 ~~adult abuse during a penitential communication is not subject to~~  
2 ~~paragraph (1). For purposes of this subdivision, “penitential~~  
3 ~~communication” means a communication that is intended to be in~~  
4 ~~confidence, including, but not limited to, a sacramental confession~~  
5 ~~made to a clergy member who, in the course of the discipline or~~  
6 ~~practice of his or her church, denomination, or organization is~~  
7 ~~authorized or accustomed to hear those communications and under~~  
8 ~~the discipline tenets, customs, or practices of his or her church,~~  
9 ~~denomination, or organization, has a duty to keep those~~  
10 ~~communications secret.~~

11 ~~(B) Nothing in this subdivision shall be construed to modify or~~  
12 ~~limit a clergy member’s duty to report known or suspected elder~~  
13 ~~and dependent adult abuse when he or she is acting in the capacity~~  
14 ~~of a care custodian, health practitioner, or employee of an adult~~  
15 ~~protective agency.~~

16 ~~(C) Notwithstanding any other provision in this section, a~~  
17 ~~clergy member who is not regularly employed on either a full-time~~  
18 ~~or part-time basis in a long-term care facility or does not have care~~  
19 ~~or custody of an elder or dependent adult shall not be responsible~~  
20 ~~for reporting abuse or neglect that is not reasonably observable or~~  
21 ~~discernible to a reasonably prudent person having no specialized~~  
22 ~~training or experience in elder or dependent care.~~

23 ~~(3) (A) A mandated reporter who is a physician and surgeon,~~  
24 ~~a registered nurse, or a psychotherapist, as defined in Section 1010~~  
25 ~~of the Evidence Code, shall not be required to report, pursuant to~~  
26 ~~paragraph (1), an incident where all of the following conditions~~  
27 ~~exist:~~

28 ~~(i) The mandated reporter has been told by an elder or~~  
29 ~~dependent adult that he or she has experienced behavior~~  
30 ~~constituting physical abuse, abandonment, abduction, isolation,~~  
31 ~~financial abuse, or neglect.~~

32 ~~(ii) The mandated reporter is not aware of any independent~~  
33 ~~evidence that corroborates the statement that the abuse has~~  
34 ~~occurred.~~

35 ~~(iii) The elder or dependent adult has been diagnosed with a~~  
36 ~~mental illness or dementia, or is the subject of a court-ordered~~  
37 ~~conservatorship because of a mental illness or dementia.~~

38 ~~(iv) In the exercise of clinical judgment, the physician and~~  
39 ~~surgeon, the registered nurse, or the psychotherapist, as defined in~~



~~Section 1010 of the Evidence Code, reasonably believes that the abuse did not occur.~~

~~(B) This paragraph shall not be construed to impose upon mandated reporters a duty to investigate a known or suspected incident of abuse and shall not be construed to lessen or restrict any existing duty of mandated reporters.~~

~~(4) (A) In a long-term care facility, a mandated reporter shall not be required to report as a suspected incident of abuse, as defined in Section 15610.07, an incident where all of the following conditions exist:~~

~~(i) The mandated reporter is aware that there is a proper plan of care.~~

~~(ii) The mandated reporter is aware that the plan of care was properly provided or executed.~~

~~(iii) A physical, mental, or medical injury occurred as a result of care provided pursuant to clause (i) or (ii).~~

~~(iv) The mandated reporter reasonably believes that the injury was not the result of abuse.~~

~~(B) This paragraph shall not be construed to require a mandated reporter to seek, nor to preclude a mandated reporter from seeking, information regarding a known or suspected incident of abuse prior to reporting. This paragraph shall apply only to those categories of mandated reporters that the State Department of Health Services determines, upon approval by the Bureau of Medi-Cal Fraud and Elder Abuse and the state long-term care ombudsman, have access to plans of care and have the training and experience necessary to determine whether the conditions specified in this section have been met.~~

~~(e) (1) Any mandated reporter who has knowledge, or reasonably suspects, that types of elder or dependent adult abuse for which reports are not mandated have been inflicted upon an elder or dependent adult, or that his or her emotional well-being is endangered in any other way, may report the known or suspected instance of abuse.~~

~~(2) If the suspected or alleged abuse occurred in a long-term care facility other than a state mental health hospital or a state developmental center, the report may be made to the long-term care ombudsman program. Except in an emergency, the local ombudsman shall report any case of known or suspected abuse to the State Department of Health Services and any case of known or~~



1 ~~suspected criminal activity to the Bureau of Medi-Cal Fraud and~~  
2 ~~Elder Abuse, as soon as is practicable.~~

3 ~~(3) If the suspected or alleged abuse occurred in a state mental~~  
4 ~~health hospital or a state developmental center, the report may be~~  
5 ~~made to the designated investigator of the State Department of~~  
6 ~~Mental Health or the State Department of Developmental Services~~  
7 ~~or to a local law enforcement agency or to the local ombudsman.~~  
8 ~~Except in an emergency, the local ombudsman and the local law~~  
9 ~~enforcement agency shall report any case of known or suspected~~  
10 ~~criminal activity to the Bureau of Medi-Cal Fraud and Elder~~  
11 ~~Abuse, as soon as is practicable.~~

12 ~~(4) If the suspected or alleged abuse occurred in a place other~~  
13 ~~than a place described in paragraph (2) or (3), the report may be~~  
14 ~~made to the county adult protective services agency.~~

15 ~~(5) If the conduct involves criminal activity not covered in~~  
16 ~~subdivision (b), it may be immediately reported to the appropriate~~  
17 ~~law enforcement agency.~~

18 ~~(d) When two or more mandated reporters are present and~~  
19 ~~jointly have knowledge or reasonably suspect that types of abuse~~  
20 ~~of an elder or a dependent adult for which a report is or is not~~  
21 ~~mandated have occurred, and when there is agreement among~~  
22 ~~them, the telephone report may be made by a member of the team~~  
23 ~~selected by mutual agreement, and a single report may be made~~  
24 ~~and signed by the selected member of the reporting team. Any~~  
25 ~~member who has knowledge that the member designated to report~~  
26 ~~has failed to do so shall thereafter make the report.~~

27 ~~(e) A telephone report of a known or suspected instance of elder~~  
28 ~~or dependent adult abuse shall include, if known, the name of the~~  
29 ~~person making the report, the name and age of the elder or~~  
30 ~~dependent adult, the present location of the elder or dependent~~  
31 ~~adult, the names and addresses of family members or any other~~  
32 ~~person responsible for the elder or dependent adult's care, the~~  
33 ~~nature and extent of the elder or dependent adult's condition, the~~  
34 ~~date of the incident, and any other information, including~~  
35 ~~information that led that person to suspect elder or dependent adult~~  
36 ~~abuse, as requested by the agency receiving the report.~~

37 ~~(f) The reporting duties under this section are individual, and~~  
38 ~~no supervisor or administrator shall impede or inhibit the reporting~~  
39 ~~duties, and no person making the report shall be subject to any~~  
40 ~~sanction for making the report. However, internal procedures to~~

1 facilitate reporting, ensure confidentiality, and apprise supervisors  
2 and administrators of reports may be established, provided they  
3 are not inconsistent with this chapter.

4 (g) (1) ~~Whenever this section requires a county adult~~  
5 ~~protective services agency to report to a law enforcement agency,~~  
6 ~~the law enforcement agency shall, immediately upon request,~~  
7 ~~provide a copy of its investigative report concerning the reported~~  
8 ~~matter to that county adult protective services agency.~~

9 (2) ~~Whenever this section requires a law enforcement agency~~  
10 ~~to report to a county adult protective services agency, the county~~  
11 ~~adult protective services agency shall, immediately upon request,~~  
12 ~~provide to that law enforcement agency a copy of its investigative~~  
13 ~~report concerning the reported matter.~~

14 (3) ~~The requirement to disclose investigative reports pursuant~~  
15 ~~to this subdivision shall not include the disclosure of social~~  
16 ~~services records or case files that are confidential, nor shall this~~  
17 ~~subdivision be construed to allow disclosure of any reports or~~  
18 ~~records if the disclosure would be prohibited by any other~~  
19 ~~provision of state or federal law.~~

20 (h) ~~Failure to report physical abuse, abandonment, abduction,~~  
21 ~~isolation, financial abuse, or neglect of an elder or dependent adult,~~  
22 ~~in violation of this section or Section 15630.2, is a misdemeanor,~~  
23 ~~punishable by not more than six months in the county jail, by a fine~~  
24 ~~of not more than one thousand dollars (\$1,000), or by both that fine~~  
25 ~~and imprisonment. Any mandated reporter who willfully fails to~~  
26 ~~report physical abuse, abandonment, abduction, isolation,~~  
27 ~~financial abuse, or neglect of an elder or dependent adult, in~~  
28 ~~violation of this section, where that abuse results in death or great~~  
29 ~~bodily injury, shall be punished by not more than one year in a~~  
30 ~~county jail, by a fine of not more than five thousand dollars~~  
31 ~~(\$5,000), or by both that fine and imprisonment.~~

32 ~~SEC. 3. Section 15630.2 is added to the Welfare and~~  
33 ~~Institutions Code, to read:~~

34 ~~15630.2.— Any financial institution subject to regulation by the~~  
35 ~~Commissioner of Financial Institutions, or in the case of a~~  
36 ~~federally chartered financial institution, subject to regulation by the~~  
37 ~~Comptroller of the Currency, the Office of Thrift Supervision, or~~  
38 ~~the National Credit Union Administration is a mandated reporter,~~  
39 ~~with respect to elder and dependent adult financial abuse only.~~

40 ~~SEC. 4.—~~

SEC. 2. Section 15657 of the Welfare and Institutions Code is amended to read:

15657. Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of ~~or has demonstrated or exhibited~~ recklessness, oppression, fraud, or malice in the commission of this abuse, ~~or where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30,~~ and that the defendant has been guilty of or has demonstrated or exhibited recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by ~~Section 337.34~~ 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

~~SEC. 5.—~~

SEC. 3. *Section 15657.5 is added to the Welfare and Institutions Code, to read:*

15657.5. (a) *Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.*

(b) *Where it is proven by clear and convincing evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and that the defendant committed that abuse with*

1 *recklessness, oppression, fraud, or malice, in addition to all other*  
2 *remedies otherwise provided by law, the following shall apply:*

3 *(1) The court shall award to the plaintiff reasonable attorney's*  
4 *fees and costs. For purposes of this subdivision, "costs" includes,*  
5 *but is not limited to, reasonable fees for the services of a*  
6 *conservator, if any, devoted to the litigation of a claim brought*  
7 *under this article.*

8 *(2) The limitations imposed by Section 377.34 of the Code of*  
9 *Civil Procedure on the damages recoverable shall not apply.*  
10 *However, the damages recovered shall not exceed the damages*  
11 *permitted to be recovered pursuant to subdivision (b) of Section*  
12 *3333.2 of the Civil Code.*

13 *(3) The standards set forth in subdivision (b) of Section 3294*  
14 *of the Civil Code regarding the imposition of punitive damages on*  
15 *an employer based upon the acts of an employee shall be satisfied*  
16 *before any damages or attorney's fees permitted under this section*  
17 *may be imposed against an employer.*

18 *(c) Nothing in this section affects the award of punitive*  
19 *damages under Section 3294 of the Civil Code.*

20 *SEC. 4.* No reimbursement is required by this act pursuant to  
21 Section 6 of Article XIII B of the California Constitution because  
22 the only costs that may be incurred by a local agency or school  
23 district will be incurred because this act creates a new crime or  
24 infraction, eliminates a crime or infraction, or changes the penalty  
25 for a crime or infraction, within the meaning of Section 17556 of  
26 the Government Code, or changes the definition of a crime within  
27 the meaning of Section 6 of Article XIII B of the California  
28 Constitution.